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No. 78-847

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY MARTIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed petitioner's conviction without opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13) was entered on October 23, 1978. The petition for a writ of certiorari was filed on November 24, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's arrest was supported by probable cause.

2. Whether petitioner was denied a speedy trial.

STATEMENT

Following a jury-waived trial, petitioner was convicted in the United States District Court for the District of Oregon on seven counts of interstate transportation of forged securities, in violation of 18 U.S.C. 2314 and 2. He was sentenced to 10 years' imprisonment. The court of appeals affirmed without opinion (Pet. App. 13).

1. The government's evidence, the sufficiency of which is not disputed, showed that on June 1, 1977, petitioner, a black male, together with co-defendant Carol Axtman, a white female, and another black male rented a blue Chevrolet Impala automobile at the Portland, Oregon Airport, and then registered in adjoining rooms at the Red Lion Motor Inn (Tr. 79-81, 84-86, 106).[1] On the same date Axtman, using the alias Linda Stuart and employing a Wisconsin driver's license as identification, opened savings accounts with small deposits at five Portland banks (Tr. 6, 21-22, 29, 34-35, 40-41). As she left one of the banks, a bank officer saw her enter a large, dark colored automobile occupied by two black males (Tr. 19). On June 2, 1977 she opened accounts in two additional

[1] "Tr." refers to the trial transcript; "S. Tr." refers to the transcript of the pretrial suppression hearing.

banks under the name Jane Thompson (Tr. 45-46, 53). That same day she deposited a check in each of the seven accounts she had opened. The checks, whose amounts totaled approximately $29,000, were drawn by one Karl Stats on a Milwaukee, Wisconsin, bank account of the Kaiser Building Company and were made payable to Axtman under her assumed names (Tr. 13, 25, 31, 38, 43, 48, 55). These instruments were eventually sent to the Milwaukee bank for collection but were returned unpaid because Karl Stats was not an authorized signatory on the Kaiser account (Tr. 66).

An official of one of the banks became suspicious when Axtman made two deposits of Kaiser checks, and notified the FBI. Agent Robert Carter conducted an investigation and discovered the extent of Axtman's activities (S. Tr. 3-5). On the morning of June 3, 1977, Carter briefed other agents assigned to the office concerning the suspected scheme. He informed them that Axtman had been observed with two black men driving a large dark blue car and that he believed the two men were Portland residents who had been involved in a similar scheme with a white woman during the preceding year (S. Tr. 6-8; Tr. 105).

Later that morning Axtman attempted to withdraw $2,000 from the account she had opened at one of the banks; she was arrested after bank officials alerted the police (Tr. 70-71, 73-74). Agent Neil Smith, who had attended Carter's briefing, and Agent Robert Hudkins were called to assist in the arrest (S. Tr.

25-29; Tr. 87, 105). As the agents approached the bank, they observed petitioner, accompanied by another black male, driving a dark blue Impala in the direction of the bank. Both occupants were looking toward the bank but proceeded past it when the agent parked (S. Tr. 22-28; Tr. 90). After the agents entered the bank and learned they were not needed, they returned to their vehicle to look for the Impala. As they pulled out into the traffic, they noticed that they were again behind the Impala. They followed as it made several loops around the block where the bank was located and noticed that the occupants repeatedly looked over their shoulders in the direction of the bank. A radio check revealed that the Impala was a rented car (S. Tr. 29-31, 36, 53; Tr. 91-93).

After circling the bank, the Impala pulled to the curb, and the passenger alighted and walked in the direction of the bank. The car continued on, making another loop around the block in which the bank was located. Petitioner then parked near the bank at a point toward which his former passenger was walking. Upon observing the agents' vehicle, however, the passenger walked past the Impala as if he did not know petitioner (S. Tr. 32, 33; Tr. 95). Stopping their car behind the Impala, Agent Smith approached petitioner for questioning, while Agent Hudkins stopped the passenger for the same purpose (S. Tr. 33-34; Tr. 95-96). Petitioner told the agent that he was Howard Collins and presented a Wisconsin driver's license bearing that name. He denied knowing either the woman who had been arrested in the bank or the person who had been his passenger. He also stated that he was in Portland to attend an athletic event and was simply stopping at the bank to obtain change (S. Tr. 34-35, 44; Tr. 98).

Agent Smith then learned that, upon questioning by Agent Hudkins, the passenger also identified himself as Howard Collins (S. Tr. 57-58; Tr. 98). When petitioner was confronted with this, he admitted that he had lied concerning his own identity and stated that he did know Collins (S. Tr. 36; Tr. 98-99). He then gave a Milwaukee, Wisconsin address and stated that he was an executive of a Milwaukee firm (S. Tr. 37; Tr. 99).

Petitioner was then arrested, and a subsequent search of his person at the United States Marshal's office revealed a piece of Red Lion Motor Inn stationery in his shirt pocket. The paper contained a list of the banks at which Axtman had opened accounts (S. Tr. 39; Tr. 100).

2. Prior to trial, petitioner moved to suppress the fruits of this search, as well as the contents of a briefcase that was seized at the time of the arrest and later searched without a warrant. The court ruled that the arrest was supported by probable cause and that the list was therefore admissible. The court granted the motion insofar as it concerned the warrantless search of the briefcase (S. Tr. 81, 84; Tr. 100; GX 53).

ARGUMENT

1. Petitioner is incorrect in contending (Pet. 6-10) that his arrest was not supported by probable cause; that contention in any event involves the application of settled principles to the particular facts and does not warrant this Court's review.

First, as the district court noted (S. Tr. 78), petitioner did not challenge the lawfulness of the agents' conduct in initially stopping and questioning him; in any event there was ample reasonable suspicion justifying the investigatory stop under the standards of *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). See also *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972). Thus, as the court noted (S. Tr. 76-77), the agents had been notified that Axtman's accomplices were two black men driving a late model dark colored car and also had been advised that persons of a similar description had previously been involved in a similar scheme in the area. By virtue of their driving pattern and furtive observations, petitioner and his passenger demonstrated a particular interest in the bank where Axtman had, only a short time before, attempted to withdraw cash. Suspicion engendered by this conduct was reinforced when the passenger alighted, walked in the direction of the bank and subsequently acted as if he was unfamiliar with petitioner when it became apparent that petitioner's vehicle was the subject of surveillance.

When the information acquired by the agents during the questioning of petitioner is added to the information they previously had, there was ample probable cause to justify the subsequent arrest. In particular, petitioner's denial that he knew his former passenger and his giving a false identity strongly suggested that he was attempting to conceal his complicity in the scheme. Furthermore, the otherwise apparent connection between petitioner and the scheme was reinforced when he revealed that he resided in the same city where the bank, upon which the fraudulent checks were drawn, was located. In sum, all of the foregoing facts supported the agents' reasonable belief that petitioner was involved in a fraudulent scheme, and the search of petitioner's person was thus incident to a lawful arrest.

2. Petitioner also contends (Pet. 10-11) that the delay between termination of the suppression hearing and commencement of the trial constituted a denial of his right to a speedy trial. This claim is unfounded.

Petitioner was arrested on June 3, 1977, indicted on June 14, 1977, and arraigned on June 30, 1977. The suppression hearing was conducted on August 4, 1977, and on August 15, 1977, the court announced its decision to grant petitioner's suppression motion insofar as it concerned the contents of the suitcase (S. Tr. 86). The prosecutor then announced his intention to appeal the ruling and requested that petitioner's case be severed from that of co-defendant Axtman (S. Tr. 87). On September 2, 1977, the court issued an order suppressing the evidence seized from the suitcase, and on September 28, 1977, the govern-

ment moved the court for reconsideration. That motion was denied on October 14, 1977, and on November 11, 1977, the government filed a notice of appeal. The Solicitor General subsequently declined to authorize the appeal, however, and the government withdrew its notice of appeal on December 16, 1977. The appeal was dismissed on December 20, 1977 (Tr. 119).

The trial was held on January 10, 1978. The district court denied petitioner's speedy trial motion, holding that the period between commencement of the suppression hearing and the issuance of the order dismissing the appeal (August 4 to December 20, 1977) was excludable delay under the District's interim speedy trial plan, and that the government was accountable for a total of only 54 days of delay between the indictment and trial (Tr. 119).

Petitioner's claim (Pet. 12) that the delay violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, is incorrect. The Act provides that in computing the time within which a trial must commence, there shall be excluded "[a]ny period of delay resulting from other proceedings concerning the defendant, including *but not limited to* * * * (D) delay resulting from interlocutory appeals; (E) delay resulting from hearings on pretrial motions * * *" (18 U.S.C. 3161(h)(1)) (emphasis supplied). The period excluded by the district court resulted from a pretrial suppression hearing and reasonably prompt efforts by the prosecutor to seek reconsideration and appeal of the

court's ruling.[2] Furthermore, the mandatory dismissal sanctions of the Act (18 U.S.C. 3162) do not become effective until July 1, 1979 (18 U.S.C. 3163(c)).

Petitioner's claim (Pet. 11) that he was denied his Sixth Amendment right to a speedy trial is also insubstantial. Such claims require a balancing of the length of the delay, the reasons for the delay, and the prejudice to the defendant. Most of the delay of 210 days between indictment and trial was, as the district court found, attributable to the adjudication of petitioner's suppression motion, and was justified as "necessary for the fair administration of 'public justice.'" *United States* v. *Herman*, 576 F.2d 1139, 1146 (5th Cir. 1978). Although petitioner, who was free on bond throughout the period of delay, asserts (Pet. 11) that he was prejudiced because his co-defendant Collins had left the country in the interim and "was unavailable to testify * * * in support of Petitioner's contention that he * * * was not involved in the scheme with Jean Axtman," he offered no reason to suppose that Collins would have testified to that effect. And in view of the evidence adduced at trial, any such testimony would have been plainly incredible. See *Smith* v. *Mabry*, 564 F.2d 249, 253 (8th Cir. 1977), cert. denied, 435 U.S. 907 (1978). Furthermore, as he admitted to the district court (Tr. 3-4), petitioner made no effort to utilize the pro-

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[2] There is no evidence in the record to support petitioner's claim (Pet. 12) that the government never intended to file an appeal.

cedures of Fed. R. Crim. P. 17(e) and 28 U.S.C. 1783, which provide for the issuance of subpoenas to United States citizens in foreign countries. In short, petitioner's bare claim of prejudice does not establish a denial of his right to a speedy trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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